Freedom of Information Act & Privacy Act Training For FOIA/Privacy Act Managers

FOIA Request

A request from any person for access to:

- Agency program files.
- Personal records on another individual.
- Personal records about himself that are **NOT** filed within a Privacy Act system of records.

FOIA

Allows any person to request copies of agency records.

Requester has to follow agency rules and agree to pay fees.

We must advise requesters on our decision within 20 business days.

Who May File a FOIA Request?

Any person. Two broad classes are excluded from "any person:"

federal government entities

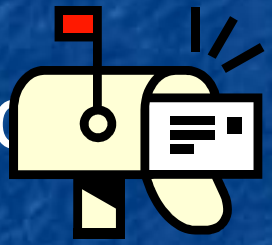
and

fugitives from justice

How are Requests to be Filed?

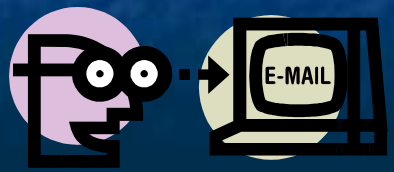
Requests must be in writing.

They may be mailed



faxed,

or dropped into electronic E-FOIA mail boxes.



Congressional FOIA Requests

Congressional inquiries made on behalf of a constituent are processed under the provisions of the Privacy Act and Freedom of Information Act. Exemptions, fees, and appeal rights may be applicable.

FOIA Fees

We bill requesters for FOIA services based on who they are. FOIA Managers determine the requester's fee category and what fees to assess:

-- Commercial users pay for all search, review, & copying.

-- News media and educational requesters pay for copying (but the first 100 pages are provided free).

-- "All Others" pay for all search and all copying (but the first 2 hours of search and the first 100 pages are provided free).

If the billable cost to process a request is $15 or less, then we automatically waive the fee.

When is a Request "Properly" Received?

1. Is the Description Reasonable?

Requester has reasonably described the records he wants. Description is considered reasonable if a professional agency employee familiar with the subject area can locate the records with a reasonable amount of effort. NOTE: Just because a request is overly broad or burdensome, does not mean it is not reasonably described!

2. Is there Agreement on the Fee Category?

If requester asks to be placed in a more favorable fee category and you disagree, you may need to ask him to justify the category. For example, you may decide that a requester should be billed as a commercial requester. You might base this on the fact that the request came in on company letterhead and the records requested have value primarily to commercial entities. If the requester has asked to be classed as "all other" or news media, ask him to either justify that request or agree to pay fees appropriate to his class (search, review, and duplication, in this example).

When is a Request "Properly" Received? (continued)

3. Has the Requester Agreed to Pay All Fees for his Requester Category or Set a Dollar Limit? If not, ask for that agreement. For example, the promise "I will pay for all reproduction up to $35" is not satisfactory if you will also be billing for search (or search and review). NOTE: The statement "I agree to pay all billable fees" is satisfactory for processing.

4. Has the Requester Justified Any Full or Partial Fee Waiver Requested? If not, ask him to address the Fee Waiver Criteria set forth in SECNAVINST 5720.42.

5. Has the Requester Justified Any Expedited Handling Request? If not, provide the criteria. In some instances, requesters are allowed to ask for "expedited treatment." If we grant expedited treatment, you will only be given 10 business days to respond. Also, delays on the requester's part in providing a reasonable description or agreeing to pay fees are not part of the 10 or 20 days.

What Constitutes an *Agency Record* for FOIA Purposes?

"Agency records" are those created or received in the course of conducting agency business, including paper, electronic or other physical forms. They include reports, letters, photograph[illegible]mails, etc.

A record must exist and be in the possession and control of the agency before it is considered for release.

The following are NOT considered agency records

Objects (furniture, wall paintings, etc)

Nontangibles (an individual's memory or oral communications)

Personal records of an individual that are:

- Maintained for the convenience of the employee AND
- Not subject to record retention and disposal rules.

Private material brought into the agency for employee's reference.

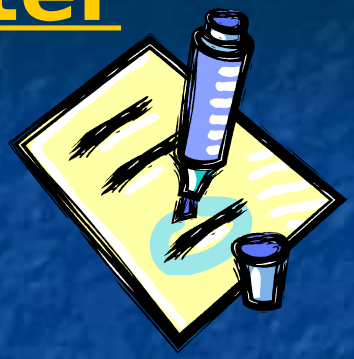
Notes created by supervisors and other employees provided they are:

- Not filed with official records; and
- Not shared with other employees; and
- Not required by law, regulation or custom to be created; and
- Not used in the decisionmaking process.

Possession and Control

A record must be under your possession and control before it may be released. A record is in your "possession" if you have it in official files. A record is under your "control" if you created it, had it created under contract, or if the record is considered to be "owned" by DON by law or regulation.

Do we give a FOIA requester everything he asks for?



Sometimes we have to issue full or partial denials. The FOIA lists nine categories of information that may be withheld from the public. These nine categories are referred to as “exemptions.” Whenever something is redacted from a document, we are required to tell the requester why we are withholding the information, which of the exemptions apply, and how to file an appeal.

Appeals

Any response deemed “adverse” may be appealed.

Appeals are to be directed to our appellate authorities (OJAG or OGC).

Once an appeal is received, the local Initial Denial Authority (IDA) will be asked to provide the case file.

A “No Record” Denial

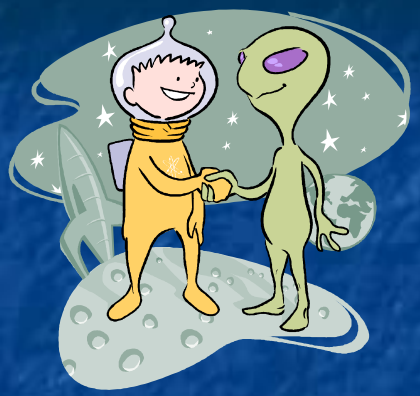
Although the Oglesby decision (Oglesby v. Department of the Army, 920 F. 2d 57 (D.C. Cir 1990)) established the requirement to treat a no record finding as an adverse action, responses do not have to be signed by an IDA, but the requester must be apprised of the right to appeal the adequacy of search.

Privacy Act Request

A request from a U.S. citizen or lawfully admitted alien (or requester's authorized agent) –

- to gain access to his records in a DLA or government-wide "System of Records."
- to have information in his file corrected
- to gain access to an "Accounting of Disclosures" – a list of all individuals who had access to his file.

Privacy Act



- Allows U. S. Citizens and lawfully-admitted aliens to have access to their own records that are filed within a "system of records."
- A requester may ask to have incorrect factual data amended.
- No charge for the request.
- Agency must respond to access requests within 20 business days and to amendment requests within 30 business days.

"Privacy Act System of Records" Defined

A group of records under the control of DLA from which personal information

is retrieved by an individual's name or by some identifying number, symbol, or other identifying particular assigned to an individual;

and

contains (along with the unique identifier) another item of personal data.

The following are NOT Privacy Act systems of records – even though they may contain personal information

- Read files: These are retrieved by date, not personal identifier.

- Folders with employees names on the label: only containing non-personal information, such as a copy of the employee's position description. These do not contain the required second element of personal data.

- Folders or databases containing commercial and financial data pertaining to contracts. Contractors have no expectation of privacy regarding their operations. They may, however, expect the data to be handled on a proprietary or confidential basis.

FOIA/Privacy Act Exemptions

The FOIA Exemptions allow us to withhold classified and "For Official Use Only" data from the public.

The Privacy Act Exemptions allow the agency to ignore certain recordkeeping requirements of the Act. However, the agency must publish its intentions to invoke an exemption beforehand. This takes the form of an "Exemption Rule" that is published in the Federal Register and codified in DLA's formal Privacy Act rules (32 CFR 323). It is also published in the Exemption Clause of the governing system notice. Two requirements that may be ignored through the publication of an exemption rule are the requirement to process (a) amendment requests and (b) access requests.

Invoking Exemptions

Invoking a FOIA Exemption. The decision to withhold a document from a FOIA requester is not made until after receipt of the request and after the search has been completed. At that point, someone must review the stack of requested documents to determine if any of the 9 FOIA exemptions apply. If so, the exempt material is deleted from the requester's copy. Otherwise, a full release is made.

Invoking a Privacy Act Exemption. The decision to withhold a document from a Privacy Act requester is made long before a request is ever received. It is made at the time the system or records notice and exemption rule are being developed. The "Exemptions" paragraph of the notice states exactly which Privacy Act exemptions the agency intends to invoke when a request is received. If no exemptions have been claimed for the system, a full release must generally be made.

Privacy Act Exemptions

The Privacy Act exemptions are found in 3 sections of 5 U.S.C. 552a:

The General Exemptions in Subsection (j). These exemptions may only be claimed in certain agencies. While DLA never cites these, here they are for information:

(j)(1) records maintained by the Central Intelligence Agency.

(j)(2) records maintain by an agency that performs as its principal function any activity pertaining to the enforcement of criminal laws.

Privacy Act Exemptions (continued)

The Specific Exemptions in Subsection (k). DLA primarily relies on (k)(2) and (k)(5). However, on occasion, we may be required to cite other (k) exemptions:

(k)(1) Classified records.

(k)(2) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2): Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identify of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Privacy Act Exemptions (continued)

(k)(3) Material involved with protection of the President or other individuals per 18 U.S.C. 3056.

(k)(4) Required by statute to be maintained and used solely as statistical records.

(k)(5) Investigatory material compiled solely for determ suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Privacy Act Exemptions (continued)

(k)(6) Testing or examination material used solely to determin individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity of fairness of the testing or examination process.

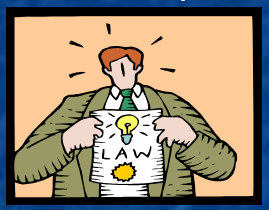
(k)(7) Evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of the material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Subsection (d)(5): This section allows withholding of material compiled in reasonable anticipation of civil action or proceeding.

Freedom of Information Act Exemptions

Exemption 1, Classified Material (5 U.S.C. 552(b)(1))
HARM: Injure the interests of national defense.

Exemption 2, Internal Matters (5 U.S.C. 552(b)(2)).
HARM: Release could allow someone to circumvent, frustrate, or render ineffective laws, statutes, or agency regulations



Exemption 3, Information prohibited from release by Federal statute (5 U.S.C. 552(b)(3)). HARM: Release would violate Federal law. Some laws set both criminal and civil penalties for wrongfully disclosing information to one not entitled to receive it.

Freedom of Information Act Exemptions (continued)

Exemption 4, Trade Secret, Commercial, and Financial Data Submitted in Confidence (5 U.S.C. 552(b)(4)).

HARM: Release could result in competitive harm to the submitter or impair government's ability to obtain necessary information in the future. The term "submitter" includes a wide range of entities, including businesses, not-for-profit organizations, state, local, and foreign governments, consultants, etc. In most circumstances, we are required to let the submitters know we plan to publicly disclose their information and provide them with an opportunity to comment on or formally bar disclosure throug

Freedom of Information Act Exemptions (continued)

Exemption 5, Government Privileged Information (5 U.S.C. 552(b)(5)). Information that would not be disclosable in litigation. This exemption covers all documents immune from civil discovery, the formal process by which litigants obtain information from each other for use in litigation. There are multiple discovery privileges; however, the most widely claimed are the deliberative process, attorney-client, attorney work product, and government commercial. HARM: Release could stifle open and honest communication within the agency; interfere with adversarial trial processes; or interfere with the procurement process by prematurely disclosing government costs, estimates, etc.

Freedom of Information Act Exemptions (continued)

Exemption 6, Personal Privacy (5 U.S.C. 552(b)(6)). HARM: Release could invade an individual's privacy or embarrass him; violate the Privacy Act; or promote threats of terrorism. There are civil and criminal penalties for violating the Privacy Act. An individual may be fined up to $5,000 for violating the Act.

Exemption 7, Records compiled for law enforcement purposes (5 U.S.C. 552(b)(7)). This exemption has 6 separate prongs, as follows:

5 U.S.C. 552(b)(7)(A) – Interference. HARM: Release could interfere with enforcement proceedings. So long as the investigation or final agency decision on the investigation is pending, this prong protects the entire investigative file. This exemption expires when the investigation is complete and the agency's action has been decided.

Freedom of Information Act Exemptions (continued)

5 U.S.C. 552(b)(7)(B) – Fair Trial. HARM: Release could create prejudicial pretrial publicity that could deprive a person of a right to a fair trial or impartial adjudication.

5 U.S.C. 552(b)(7)(C) – Personal Privacy. HARM: Release could constitute an unwarranted invasion of personal privacy. This exemption is applied to the names and identifying details of investigators, suspects, witnesses, sources, and persons casually mentioned in law enforcement records. There is a strong interest in protecting individuals from being associated with alleged criminal activity. Despite the similarities in language with FOIA Exemption 6, Exemption (7)(C) is much broader.

5 U.S.C. 552(b)(7)(D) – Confidential Sources. HARM: Release could disclose the identity of a source, including a State, local or foreign agency who furnished information on a confidential basis. Source names are protected to prevent retaliation against sources and to ensure that witnesses continue to be willing to talk to investigators.

Freedom of Information Act Exemptions (continued)

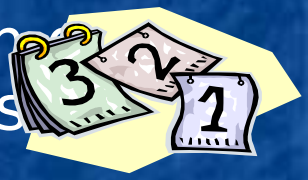
5 U.S.C. 552(b)(7)(E) – Investigative Techniques and Procedures. HARM: Release would allow people to break the law and go undetected. Examples of data appropriate for withholding would be the location of hidden cameras, methods by which investigators verify statements, procedures for detecting crimin etc.

5 U.S.C. 552(b)(7)(F) – Physical Safety. HARM: This exemption allows the withholding of information necessary to protect the physical safety of a wide range of individuals and is appropriately applied when a requester has threatened individuals in the past. While this exemption is similar to Exemption (7)(C), it is considerably broader. So long as there is a reasonable likelihood of disclosure risking physical harm to any individual, the person's name and identifying data r ithheld.

Privacy Act vs. FOIA

Exemptions: Both statutes have their own unique exemptions that you may be required to apply.

Time Limits: 20 days from date of receipt for FOIA and Privacy Act access requests; 30 days from date of receipt for Privacy Act amendment requests.



Appeal Rights: Both statutes have provisions that allow the requester to appeal any decision you make. Appeals must be filed within 60 calendar days from the date of your denial letter.

NOTE: The Privacy Act includes a provision for appealing amendment denials only – not access denials. However, as a result of a court decision, we provide appeal rights for any adverse decision, including Privacy access denials.

Privacy Act Exemptions and Parallel FOIA Exemptions

When Citing This Privacy Act Exemption	Also Cite this FOIA Exemption
(k)(1) Classified	(b)(1)
(k)(2) Investigatory Records	Any applicable (b) exemption
(k)(5) Confidential Sources	(b)(7)(D)
(k)(6) Test material	(b)(2)
(k)(7) Armed Forces evaluations	(b)(7)(D)
(d)(5) Anticipated non-criminal legal proceeding	(b)(5)

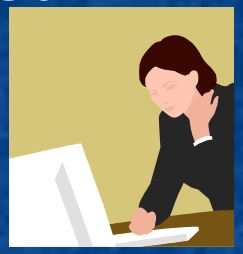
Do not withhold unless data is exempt from release under both statutes.

Denial letters must cite both the Privacy (k) and the FOIA (b) exemptions.

Who is Authorized to Sign Responses to FOIA and Privacy Requests?

Full Releases: Anyone with knowledge of the sensitivities of data may sign.

Full and Partial Denials: These must be prepared with the signature block of the authorized "Initial Denial Authority" (IDA).



If the IDA is out of town and cannot sign, another person may sign "for" the IDA provided that person has been delegated (formally or informally) to act "for“ the person. In all cases, denial letters must be issued with the signature block of the authorized denial

Miscellaneous Do's and Don't

- Maintain a file of FOIA policy documents. Destroy only when superseded.
- Do not release or deny a record you did not create. Instead, refer it to the creating agency.
- Records placed in a Federal Records Center for storage are subject to FOIA. Recall as necessary.
- Before issuing a "no record" denial claiming the records have been destroyed, check the Records Disposition Guide.
- If you receive requests for your FOIA log, delete the names of Privacy Act requesters. Cite (b)(6).
- Requests for lists of names: Continue to deny but also refer requester to your website.

Miscellaneous Do's and Don't

- Destroy FOIA records on time
  - Denials – Retain for 6 years.
  - All other cases – Retain for 2 years.
  - Logs – Retain for 6 years after last entry.
  - Feeder Reports – Retain for 2 years.
  - Policies – Destroy when superseded.

- Don't deny a record under the Privacy Act unless a FOIA exemption also applies. Cite both FOIA and Privacy exemptions.

- Bill where fees are involved. Do not waive fees unless justified or they fall within the automatic waiver threshold.

- Include appeal rights on all adverse determinations, including fee denials, category refusals, etc.

Electronic FOIA Websites

Under subsection (a)(2) of the FOIA, agencies must make four distinct categories of records affirmatively available for "public inspection and copying.“ These so-called "reading room" records consist of:

(1) "final opinions [and] . . . orders" rendered in the adjudication of administrative cases;

(2) specific agency policy statements;

(3) certain administrative staff manuals; and,

(4) as of March 31, 1997, records disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.”

The FOIA now requires that these records made available electronically as well as in paper format. DON accomplishes electronic availability through its FOIA website.